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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1370

FORD MOTOR COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY OF PETITIONER FORD MOTOR COMPANY

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REPLY ARGUMENT

The Government has opposed petitions for a writ of certiorari filed by several carriers, by petitioner Ford Motor Company, and by a major shippers' association.[1] These petitions seek review of a decision of the Court of Appeals for the Third Circuit which refused to set aside rules promulgated by the Interstate Commerce Commission concerning detention of motor vehicles. These rules upset existing carrier practices whereby the carriers avoid deten-

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[1]Oppositions have also been filed by several carrier organizations.

tion of their power equipment by using holding yards at consignees' plants for delivery of trailers.[2]

The Government's opposition rests upon a number of statements about the record in the agency proceeding that are simply not supported by the record itself. This is not surprising, since the agency's decision (a) is based upon shifting and contradictory reasons; (b) is grounded on an incorrect premise as to the applicability of detention charges; and (c) lacks record support for key determinations.

1. The Government's opposition carefully avoids stating that detention charges are applicable where trailers are placed in holding yards in lieu of delivery by placement at shipper unloading docks. (It never denies that this is so, and it painstakingly describes the application of detention charges in other circumstances. (Opp. p. 5.)) Yet the basic premise of the Commission's decision to change existing holding yard practices is its misconception that shippers and consignees could avoid detention charges by means of holding yards.[3] As Ford's petition demonstrates, the agency persisted in this erroneous factual premise through three rounds of decision-making. Apparently the Government concluded that the only way to defend the agency's position was to ignore the issue.

2. The Government tries to dispose of petitioners' claim that the ICC's spotting rules abrogate the carriers'

[2]Ford Motor Company has no quarrel with the Commission's desire to establish uniform detention rules or with the level of detention charges. But it does oppose the new spotting rules which relieve the carriers of responsibility for switching the trailer from the holding yard to the unloading area. The rule means that the shipper or consignee must pay new charges in addition to the usual rates, for less service, and would largely eliminate the use of holding yards.

[3]Detention charges have been applicable to trailers in holding yards and would continue to be applicable under the new rules. (Ford Pet., p. 7; Middle Atlantic Conference Opp. to Pet., pp. 3-4.)

established duty under line-haul tariff rates to provide delivery by stating that: "Many shippers already move trailers to their docks at their own expense." (Opp., p. 9, n. 8.) There is no citation to the record set out in the Government's brief, no doubt because this statement is not supported by the record of the agency proceeding. Again, the Government's difficulty arises because of the basic deficiencies in the agency determination. Originally the agency maintained that carrier-operated holding yards were a departure from traditional practices (73a). But in its first decision on reconsideration it changed to argue that the practice was not "universal" (139a-140a) based upon a reference to one plant of a consignee where the consignee shifted trailers, although there were carrier-operated holding yards at other major plants of the consignee. (Ford pet., pp. 10-11; J.A. 708-709.) Although some 18 shippers, 13 shippers' associations, 19 motor carriers and 12 carriers' associations and rate bureaus participated in the proceedings (81a-83a), neither the agency, nor the Government here have identified any other record support for this position.

Thus, contrary to the Government's unsubstantiated claim, *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 816-18 (1973) is very much on point. Here, the ICC proposes to establish a spotting rule imposing a separate charge for a service previously covered by the line-haul rates.[4] But it did not consider,

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[4]The cases cited by the Government to show that the proposed spotting rules do not change existing carrier duties are inapposite. (Opp. pp. 9-10.) None of the cases involved the use of holding yards by carriers as a way of avoiding detention of over the road equipment and wasted driver time in accomplishing delivery. Montgomery Ward & Co. v. N. Pac. Term. Co., 128 F. Supp. 475, 491 (D. Ore. 1953) was a shipper's claim for damages for the railroads' failure to deliver and pick up at the plant during a strike. The court dwelt on the carriers' fundamental obligation to deliver to the consignee. General Elec. Co. v. Acme Fast Freight, Inc., 324 F. Supp. 1079, 1083 (D. Md.), *aff'd*, 440 F.2d 412 (4th

despite the mandate of *Wichita Board of Trade* (and the showing that the use of holding yards decreases carriers' costs) whether there should be an adjustment to the carriers' rates.

3. The Government argues that the imposition of additional charges on shippers and consignees under the spotting rules is justified because otherwise small shippers might bear the costs of big shippers. (Opp., pp. 10-11.) The agency never addressed this issue in its decisions and the argument has no support in the record. One of the major deficiencies of the agency decision is that although the agency refers to the possibility of service discrimination between large and small shippers, there is absolutely no evidence of record to support any claim of disadvantage, cost-wise or otherwise, to small shipppers resulting from the use of holding yards. The Commission made no independent study of the comparative costs of carrier deliveries with or without holding yards; the only evidence of record showed that carrier costs were lower where holding yards were used (J.A. 37-52). Not only is there no evidence that holding yards could result in higher costs to small shippers, but the record indicates that line-haul rates would be lower, not higher, if the holding yard alternative is available to the carriers. Moreover, the ICC eliminated any possible advantage to large shippers by mandating prearranged deliveries for all shippers.

Cir. 1971), raised liability question about shipments stolen from a trailer placed for unloading at an unloading bay at consignee's plant. Republic Carloading & Distrib. Co. v. Missouri Pac. R.R. Co., 302 F.2d 381, 386 (8th Cir. 1962) also involved liability for goods stolen in a freight depot. Paperboard Between N.J. & N.Y., N.Y., 315 I.C.C. 187 (1961), cited by Middle Atlantic Conference (Opp. p. 7), likewise did not involve holding yards. The ICC said that the carrier was entitled to additional compensation where up to five deliveries at different consignees were requested. The same point is made in Rules and Rates of O.K. Transfer Storage Co., 18 M.C.C. 699, 702 (1939), that motor carriers are not obliged to deliver to several consignees or to pick up from several consignors in connection with a single shipment.

The Government's efforts to defend the agency's action lay bare the basic weaknesses of that decision. The court below adopted a "hands-off" approach to its reviewing function because it believed itself severely constrained by this Court's decision in *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1942) — even though it expressed serious concerns about the agency's decision. Petitioners have asked that certiorari be granted because this case illustrates the need for clarification of the court's role in providing a limited, but meaningful, reviewing function. The court below did not properly apply the review standards set by this Court (even though it quoted at length from the *Allegheny-Ludlum* decision and recited that the agency action was "rationally supported"). The increase of agency use of the rulemaking process makes it even more critical that agency discretion be subject to effective judicial oversight.

Respectfully submitted,

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